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No. 58296-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, a Washington Non-Profit Corporation; and NORTHSHORE UNITED CHURCH OF CHRIST, a Washington Public Benefit Corporation,

Appellants,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent / Cross-Appellant.

BRIEF OF APPELLANT SHARE/WHEEL

Sean A. Russel
WSBA No. 34915
Attorneys for Appellant
SHARE/WHEEL

TODD & WAKEFIELD, PS
1501 Fourth Avenue, Suite 1700
Seattle, WA 98101
Telephone: (206) 622-3585
Facsimile: (206) 583-8980

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I. ASSIGNMENTS OF ERROR AND ISSUES RELATED THERETO

A. The trial court erred when it conducted a summary proceeding that decided the Respondent's original claim for injunctive relief with its amended claim for breach of contract.

1. Under the Washington State Constitution, the Superior Court Civil Rules and associated common law principles, are the Appellants entitled to jury trial when there are legal issues concerning an alleged breach of contract that were raised after all of the briefing was filed and served?

B. The trial court erred when it ruled that SHARE/WHEEL and the NUCC breached the 2004 Temporary Property Use Agreement.

1. Whether an agreement drafted specifically for siting a homeless encampment in 2004 applies to the 2006 encampment where there is substantial evidence that it was only intended to apply to a limited period in 2004?

2. Alternatively, if the 2004 Temporary Property Use Agreement does apply to the 2006 encampment, whether the Respondent breached its contractual obligations by refusing to accept an application for a Temporary Use Permit for siting Tent City 4 on property owned by appellant Northshore United Church of Christ?

II. STANDARD OF REVIEW

The standard of review of a summary judgment is de novo. Green v. American Pharmaceutical Co., 136 Wn.2d 87, 94, 960 P.2d 912 (1998). The trial court's June 12, 2006 Final Order summarily granted the Respondent injunctive relief and specific performance for breach of contract.

The trial court's June 12, 2006 Final Order also ruled on issues of law. Issues of law are reviewed de novo. Clayton v. Grange Ins. Ass'n., 74 Wn. App. 875, 877, 875 P.2d 1246 (1994); State v. Pierce County, 65 Wn. App. 614, 617-18, 829 P.2d 217 (1992).

III. STATEMENT OF THE CASE

A. FACTS.

This lawsuit arises from respondent City of Woodinville's ("Respondent") motion for a temporary restraining order to prevent appellant Northshore United Church of Christ ("NUCC") and appellant Seattle Housing and Resource Effort/Women's Housing Equality and Enhancement Project ("SHARE/WHEEL") (collectively, "Appellants") from temporarily locating Tent City 4 ("TC4") on property owned by NUCC.

1. Background Of SHARE/WHEEL And TC4.

SHARE/WHEEL is the sponsoring organization for TC4. In addition to sponsoring TC4, SHARE/WHEEL sponsors Tent City 3, another homeless encampment similar to TC4, but primarily located in Seattle. [VRP, June 6, 2006, pp. 29-30.]

TC4 is a self-managed homeless community that began on May 17, 2004 in Bothell, Washington. At any one time, Tent City 4 provides shelter for between 60 and 100 homeless individuals. These individuals come from various backgrounds. [VRP, June 6, 2006, p. 36, ll. 4-25.] Many TC4 residents are educated, but for one reason or another do not have a permanent residence. All TC4 residents share one thing in common: they are part of our region's working poor. [VRP, June 6, 2006, p. 36, ll. 4-12.]

TC4 provides opportunity for homeless individuals that is otherwise not available. TC4 provides temporary shelter for individuals who are waiting to obtain public assisted living arrangements, otherwise known as "affordable housing." [VRP, June 6, 2006, pp. 12-25.] Unlike traditional homeless shelters, which only allow access during the night and offer no long term storage, TC4 provides privacy, storage and 24-hour access for homeless individuals. [Id.] By doing so, TC4 creates opportunities for homeless individuals to secure employment within the

local community. [Id.] It is widely known that successful employment is a critical component of ending homelessness.

TC4 is a self-governed community. Because it is self-governed, all residents abide by the "SHARE/WHEEL Tent City 4 Code of Conduct." The code of conduct prohibits residents from engaging in behaviors such as alcohol and drug use, weapons possession, violent activity, and using derogatory language while a resident of TC4. Violators are immediately ejected. [VRP, June 6, 2006, p. 36, ll. 13-25; p. 49, ll. 10-24.]

2. The 2004 Temporary Property Use Agreement.

In the Summer of 2004, TC4 looked to the Respondent for shelter. The Appellants submitted a Temporary Use Permit ("TUP") application to the Respondent to site TC4 on property owned by appellant NUCC. Although the Respondent was unwilling to allow TC4 to move onto appellant NUCC's property, it offered an alternative site that was owned by the Respondent ("the Lumpkin Property"). [VRP, May 30, 2006, pp. 29-31.]

The Respondent's allowance of the Lumpkin Property was not without conditions. The Respondent conditioned use of the Lumpkin Property on the execution by the parties of a Temporary Property Use

Agreement ("2004 Agreement"). [VRP, May 30, 2006, pp. 32-33.] The 2004 Agreement:

> Served as a surrogate for a conditional use permit until the Temporary Use Permit process [for the Lumpkin Property] was complete.
>
> * * *
>
> The Agreement defined specified milestones for S/W to act as accepting the Agreement, notifying the City of its next location, and ensuring the City it is working to obtain permits for its next location. The Agreement required that TC4 abide by its own Code of Conduct, protect environmentally sensitive areas on the site, and allow inspections by government representatives. Additionally, S/W was to encourage its residents to participate in City volunteer programs. The Agreement also required NUCC to obtain and maintain general liability insurance.

[CP 171-72.]

Although the 2004 Agreement expressly stated that it was to apply only to the 2004 stay and for a period of 40 days after August 14, 2004, the Respondent granted a 60-day extension to accommodate a SEPA appeal and complete the TUP application review process. The TUP application was ultimately approved and a permit was issued. After a successful stay, on November 12, 2004, TC4 moved to St. John Mary Vianney Church in unincorporated King County. TC4's move was two days prior to the expiration of the TUP. [CP 193-194.]

3. The 2006 Request For Shelter.

In the Spring of 2006, TC4 looked to the Respondent again for shelter. On April 10, 2006, the Appellants contacted the Respondent to discuss the possibility of siting TC4 within the Respondent's city limits. [VPR June 5, 2006, pp. 5-6.] Then on April 21, 2006, SHARE/WHEEL's Scott Morrow and the NUCC's Pastor Paul Forman met with the Respondent's Community Director, Ray Sturtz. [VRP, June 6, 2006, pp. 6-7.]

On April 24, 2006, Mr. Morrow and Pastor Forman met again with the Respondent's representatives. At this meeting, the Respondent's representatives advised the Appellants to file land use applications for siting TC4 both at the Lumpkin Property and the property owned by the NUCC. [VRP, June 6, 2006, p. 7.] Although there was an existing moratorium that limited development in R-1 zoning districts, the Respondent did not advise the Appellants of its existence or potential impact on their TUP applications. [VRP, June 5, 2006, pp. 9-10.] Consequently, Mr. Morrow and Pastor Forman presented two TUP applications to the Respondent on April 25, 2006. [VRP, June 6, 2006, p. 9.]

However, after spending a significant amount of time preparing the TUP applications at the direction of the Respondent, the Appellants were

only allowed to submit their TUP application for the Lumpkin Property. In other words, the Respondent refused to accept the Appellants' TUP application for the NUCC property. [VRP, June 6, 2006, p. 10.] As suspected, the Respondent's Planning Department recommended approval of the TUP application for the Lumpkin Property. Final approval of the TUP application and issuance of a TUP was to be determined by the Woodinville City Council. [VRP, May 30, 2006, p. 45, ll. 10-23.]

Because the Planning Department for the Respondent recommended approval of the TUP permit for the Lumpkin Property, the Appellants believed that they had located a new temporary site for TC4. However, on May 8, 2006, in an uncharacteristic change in events, the Woodinville City Council disregarded the recommendation for approval of the TUP and denied the Appellants' application. [VRP, June 6, 2006, p. 13.]

4. The Respondent's Temporary Restraining Order.

With the Woodinville City Council's denial of the Appellants' TUP application for the Lumpkin Property, the Appellants, and more importantly – the residents of TC4 – were facing a dire situation. Yet, the Appellants were reluctant to move to either the NUCC property or the

Lumpkin Property without a valid land use permit. [VRP, June 5, 2006, p. 16, ll. 12-20.]

Surprisingly, even though the Respondent denied the Appellants the opportunity to provide shelter for TC4 residents, the Respondent remained concerned about the presence of TC4 within the Respondent's city limits. Therefore, on May 12, 2006, the Respondent filed a complaint for injunctive relief and moved for a temporary restraining order ("TRO"). [CP 1-6, CP 7-71.] The filing of the TRO was the first time the Respondent raised the issue of the applicability of the 2004 Agreement. [VRP, June 9, 2006, pp. 73-75.]

Left with no other choice but to challenge the TRO, the Appellants appeared before the Honorable Palmer Robinson of the King County Superior Court on the afternoon of May 12, 2006 to present oral argument in opposition to the Respondent's motion for a TRO. Surprisingly, rather than provide the Respondent with the relief sought, Judge Robinson issued a TRO that actually allowed TC4 to occupy the NUCC property until such time as would allow for a full hearing on the plaintiff's motion for preliminary injunctive relief. [CP 72-76.] In accordance with the terms of the TRO, appellant NUCC extended an offer to appellant SHARE/WHEEL and TC4 to site TC4 on the NUCC property. [VRP,

June 5, 2006, pp. 17-18.] Prior to the May 12, 2006 TRO, appellant NUCC did not make a formal offer to either appellant SHARE/WHEEL or TC4 to locate TC4 on the NUCC property. [VRP, June 5, 2006, p. 16, ll. 12-20.]

On May 22, 2006, the Respondent filed its Motion to Quash the Existing Temporary Restraining Order; and for Preliminary and Final Injunctive Relief Prohibiting the Tent City 4 Homeless Encampment on R-1 Zoned Property in the City of Woodinville and from Relocating Anywhere in the City of Woodinville Without First Obtaining All Permits Required by City Ordinance ("Motion to Quash"). [CP 77-148.] The Respondent requested that the trial court (1) quash the temporary restraining order entered on May 12, 2006; (2) consolidate a trial on the merits with the hearing for preliminary injunction pursuant to CR 65(a)(2); (3) order preliminary injunctive relief; and (4) order permanent injunctive relief. [Id.]

In response to the issues raised in the Respondent's (1) Complaint for Injunctive Relief; and (2) Motion to Quash, the Appellants filed their respective opposition briefing to the Respondent's Motion to Quash on May 25, 2006. [CP 226-247, 350-362.] Appellant SHARE/WHEEL argued that (1) there were compelling reasons why a trial on the merits

should not be consolidated with the hearing for preliminary and final injunctive relief; (2) there was no "well-grounded" fear that TC4's occupancy of NUCC's property would violate the Woodinville Municipal Code; (3) there would be no actual or substantial injury created by TC4's occupancy of NUCC property; and (4) SHARE/WHEEL did not breach the 2004 Temporary Property Use Agreement because the 2004 Agreement did not apply to the proposed occupancy of NUCC property in 2006. [CP 350-362.]

Appellant NUCC argued that (1) use of the church property to shelter homeless is an accessory use of the property under the Woodinville zoning code, and that no permit was needed to host TC4; (2) if a temporary use permit was needed, the respondent should not have arbitrarily and capriciously refused to accept the land use application for the temporary use permit simply because of a moratorium on development permit; and (3) the moratorium was overly broad and insufficiently tailored to minimize its impact on religious freedom. [CP 226-247.] The Respondent filed its Reply Brief on Friday, May 26, 2006. [CP 368-400.]

May 26, 2006 was the Friday prior to the three-day, Memorial Day holiday weekend. The hearing on the Respondent's Motion to Quash was noted for the following Tuesday, May 30, 2006 at 8:30 a.m. Surprisingly,

on the afternoon of May 26, 2006, the Respondent filed and served upon the Appellants its Amended Complaint for Injunctive Relief for Damages and Specific Performance. [CP 363-367.] The Respondent's Amended Complaint added a cause of action for breach of contract, alleging that the Appellants breached the 2004 Temporary Property Use Agreement by (1) untimely filing an application for a Temporary Use Permit ("TUP"); and (2) by siting TC4 on NUCC's property without a valid TUP. The Respondent requested that the trial court specifically enforce the provisions of the 2004 Agreement and awarded damages. [Id.]

On the morning of Tuesday, May 30, 2006, the parties appeared before the Honorable Charles Mertel of the King County Superior Court on the Respondent's Motion to Quash. [VRP, May 30, 2006, p. 2, ll. 9-13.] In a surprise to all those present, Judge Mertel decided to conduct an evidentiary hearing and summary proceeding rather than hear oral argument and provide a ruling that morning. [VRP, May 30, 2006, pp. 9-10.] The Appellants submitted their respective objections to the consolidated proceedings on June 6, 2006. [CP 446-457.]

In the end, the evidentiary hearing summarily resolved equitable issues relating to the Respondent's request for injunctive relief and legal

issues relating to the Respondent's amended claim for breach of contract. [VRP, June 9, 2006, pp. 91-101.]

B. THE TRIAL COURT'S RULING.

On June 9, 2006, Judge Mertel ruled, as it applies to appellant SHARE/WHEEL's brief, as follows:

(1) The 2004 Temporary Property Use Agreement is unambiguous, and appellants SHARE/WHEEL and the NUCC breached the agreement by siting TC4 on the NUCC property without obtaining a land use permit from the city of Woodinville. [VRP, June 9, 2006, pp. 98-99.]

(2) The proceeding summarily decided the Respondent's complaint seeking injunctive relief with its complaint for breach of contract. [VRP, June 9, 2006, pp. 98-99.]

The Final Order was entered on June 12, 2006. [CP 477-483.] This appeal was filed that afternoon. [CP 484-504.]

IV. ARGUMENT

A. THE TRIAL COURT ERRED BY CONSOLIDATING A TRIAL ON THE MERITS FOR THE RESPONDENT'S BREACH OF CONTRACT CLAIM WITH THE RESPONDENT'S CLAIM FOR INJUNCTIVE RELIEF.

Civil Rule provides that, under certain circumstances, a trial on the merits may be consolidated with a preliminary injunction hearing. It reads, in pertinent part:

> Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

CR 65(a)(2) (emphasis added).

Article 1, Section 21 of the Washington State Constitution provides that "[T]he right of trial by jury shall remain inviolate." Wash. Const. art. I, § 21. Civil Rule 38 preserves the right provided under Article I, § 21. See CR 38 ("The right of trial by jury as declared by article 1, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate").

Parties generally have a right to a jury trial in a civil action if the issues are legal rather than equitable. Allard v. Pac. Nat'l Bank, 99 Wn.2d

394, 399, 663 P.2d 104 (1983). Although a trial court does have some discretion as to whether to allow a jury trial when both legal and equitable claims are presented, such discretion is not without limits. As the court stated in Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 467 P.2d 372 (1970):

> Such discretion should be exercised with reference to many factors including, but not necessarily limited to the following: (1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of the issues.

Scavenius, 2 Wn. App. at 128 (emphasis added).

Under the circumstances surrounding the Respondent's claim for breach of contract, the trial court should have allowed the Appellants to have the legal issues tried to a jury. The Appellants were disadvantaged from the inception of the Respondent's breach of contract claim

As discussed above, the Respondent's (1) filed its complaint for injunctive relief; (2) filed its Motion to Quash the May 12, 2006 TRO; and

(3) filed its reply briefing in support of its Motion to Quash before it amended its complaint to include a claim for breach of contract. Most important for this review is the fact that the Appellants never had an opportunity to brief, much less investigate, the Respondent's claim for breach of contract.

Presumably, had the Respondent's Motion to Quash been briefed, argued and decided by May 30, 2006, this issue may never have arisen. However, the trial court's decision to conduct an evidentiary hearing completely changed the landscape of the proceedings. Rather than having an opportunity to evaluate the Respondent's breach of contract claim and conduct necessary discovery, the Appellants were forced to defend themselves "on the fly." Had the trial court gone "beyond the pleadings to ascertain the real issues in dispute," it would have likely concluded that the Respondent's breach of contract claim should have been tried to a jury.

Consequently, appellant SHARE/WHEEL respectfully requests that the Court reverse the trial court's summary ruling denying the Appellants their constitutionally protected right to a jury trial.

B. THE TRIAL COURT ERRED WHEN IT RULED THAT THE APPELLANTS BREACHED THE 2004 TEMPORARY PROPERTY USE AGREEMENT.

1. The 2004 Agreement Did Not Apply To The Events Of 2006.

The "cardinal rule" of contract interpretation is to "ascertain the intention of the parties." Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990), citing Corbin, The Interpretation of Words and the Parole Evidence Rule, 50 Cornell L. Quar. 161, 162 (1965); See also, Martinez v. Miller Industries, Inc., 94 Wn. App. 935, 974 P.2d 1261 (1999) (touchstone on contract interpretation is the parties' intent).

The parties' intent may be determined from construing the contract as a whole. Berg v. Hudesman, 115 Wn.2d 657, 666, 801 P.2d 222 (1990). The Berg court stated:

> In approaching contract interpretation every court should heed the strong words of Corbin:
>
> It can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances, that the meaning of such terms and sentences consists of the ideas that they induce in the mind of some individual person who uses or hears or reads them, and that seldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third persons.

Berg, 116 Wn.2d at 664, quoting, 3A. Corbin, Contracts, § 536, at 27-28 (1960).

The Berg court emphasized the importance of the parties' conduct in interpreting the contract:

> In discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract.
>
> * * *
>
> Parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. If the evidence goes not further than to show the situation of the parties and the circumstances under which the instrument was executed, then it is admissible.

Berg, 115 Wn.2d at 668-69 (emphasis added).

A harmonious reading of the 2004 Agreement, combined with testimony regarding its drafting and intended applicability, and the actions of the contracting parties establishes that the 2004 Agreement was only

intended to apply to the TC4's 2004 stay in Woodinville. The 2004 Agreement includes the following provisions:

> Section 2. Conditions. SHARE/WHEEL'S use of the Property pursuant to this Agreement is expressly subject to the following conditions and limitations, which shall be strictly observed and construed:
>
> A. SHARE/WHEEL shall not establish or support in any way any other unpermitted homeless encampments anywhere in the City of Woodinville *during this period or a permitted extension thereof.*
>
> B. SHARE/WHEEL and one or more Woodinville-based church sponsor(s) may jointly submit an application to locate a future Tent City at some other church-owned location, but
>
> (1) Must allow sufficient time in the application process for public notice, public comment and due process of the permit application, and
>
> (2) Must agree not to establish, sponsor or support any homeless encampment within the City of Woodinville without a valid temporary use permit issued by the city.
>
> * * *
>
> Section 3. Duration of Stay on Property. SHARE/WHEEL shall promptly vacate the property no later than *40 days after August 14, 2004. PROVIDED, that SHARE/WHEEL and one or more Woodinville-based church sponsor(s) may jointly submit an application to maintain Tent City 4 at the Property for an additional 60 days, provide that a valid city permit is issued within the initial occupancy period of up to 40 days.*

A. If such extension is intended, an application for a city temporary use permit must be submitted no later than close-of-business on August 12, 2004 to allow for expedited processing and adequate public process.

B. If such extension is agreed to between the parties, SHARE/WHEEL must agree not to operate, sponsor or otherwise support a homeless encampment in Woodinville before November 1, 2005 unless invited sooner by the City of Woodinville and one or more Woodinville-based church sponsor(s). For purposes of this Agreement, Woodinville-based church sponsorship means that one or more local faith-based communities will help sustain the successful operation of the Tent City 4 community for the duration of its visit in Woodinville, evidence with a commitment to ensure contributions of food, counseling, donations, transportation, and other general support of the residents of Tent City 4.

C. If the parties agree to extend the temporary homeless encampment in the City of Woodinville through the initial period of up to 40 days authorized by the City and an additional 60 days allowed by a valid temporary use permit; on or before September 25, 2004, SHARE/WHEEL shall demonstrate to the satisfaction of the City Manager that SHARE/WHEEL has identified and is seeking to legally obtain appropriate permits in other potential host communities for the relocation of the temporary homeless encampment.

[CP 357-358]

The parties clearly intended the terms of the 2004 Agreement to be valid for a limited period in 2004. The plain language of the 2004 Agreement establishes that the parties would allow SHARE/WHEEL to

occupy the plaintiff's land for a period lasting no longer than 40 days from August 14, 2004, unless the parties agreed to a 60-day extension. During the period SHARE/WHEEL was required to obtain all necessary permits prior to occupying property within the Woodinville city limits. The terms of the 2004 Agreement do not address obligations of appellants SHARE/WHEEL and NUCC beyond the 2004 period.

Testimony from SHARE/WHEEL's Mr. Morrow and Bruce Thomas, a TC4 resident involved in the drafting of the agreement, further establish that appellant SHARE/WHEEL did not intend for the 2004 Agreement to apply outside the period described in Section 3 of the 2004 Agreement. Mr. Morrow testified that although the representative of the Respondent may have believed that Section 2(B) of the 2004 Agreement applied as a "future consideration" [VRP May 30, 2006, p. 40, ll. 1-14], such an understanding was never contemplated at any time by appellant SHARE/WHEEL or members of TC4.

Finally, the actions of the Appellants and the Respondent between the first communication regarding siting TC4 in 2006 on April 10, 2006 and the entry of the TRO on May 12, 2006, establish that neither party contemplated the applicability of the 2004 Agreement to the proposed 2006 visit. Rather, numerous negotiations occurred without the mention

of the document, and only when seeking its TRO did the Respondent produce the 2004 Agreement.

The plain language of the 2004 Agreement, combined with the testimony at the evidentiary hearing and the actions by the parties to the agreement, establishes that the 2004 Agreement was only intended to apply to TC4's 2004 occupancy of appellant NUCC's property.

Consequently, appellant SHARE/WHEEL respectfully requests that the Court reverse the trial court's ruling that the Appellants breached the 2004 Agreement.

2. If The 2004 Agreement Applies To The Events Of 2006, The Respondent, Not The Appellants, Breached The Agreement.

Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms. See Metro Park District of Tacoma v. Griffith, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986). Application of the provisions to only one party is an illusory promise. Id., citing Wharf Rest., Inc. v. Port of Seattle, 24 Wn. App. 601, 609, 605 P.2d 334 (1979).

If a contract lacks a corresponding duty, it is unenforceable for lack of mutuality. See Brem-Rock, Inc. v. Warnack, 28 Wn. App. 483, 489 n.

8, 624 P.2d 220 (1981), overruled on other grounds by, French v. Sabey Corp., 134 Wn.2d 547, 557, 951 P.2d 260 (1998).

Section 2(B) of the 2004 Agreement provides that:

> [O]ne or more Woodinville-based church sponsor(s) may jointly submit an application to locate a future Tent City at some other church-owned location.

[CP 357.]

As described above, the Appellants, at the advice of the Respondent, attempted to submit two TUP applications to the Respondent on April 25, 2006. The Respondent accepted the TUP application for the Lumpkin Property, but refused to accept the TUP application for the property owned by appellant NUCC.

If the 2004 Agreement applies to the events of 2006, which the Appellants dispute, it should be applied equally to all contracting parties. Thus, any alleged obligations of the Appellants must be weighed equally against the obligations of the Respondent.

Consequently, if the Court concludes that the 2004 Agreement is unambiguous, it should also conclude that the Respondent had an obligation to, at the very minimum, accept the TUP application concerning siting TC4 on the property owned by NUCC. Because the Respondent did

not accept the TUP application, the Court should reverse the trial court's ruling that the Appellants breached the 2004 Agreement.

C. THE TRIAL COURT ERRED WHEN IT RULED THAT TC4 CREATED A NUISANCE PER SE.

During the evidentiary hearing, the Respondent contended that, under City of Mercer Island v. Steinmann, 9 Wn. App. 479, 513 P.2d 80 (1973), TC4 was a nuisance per se. The trial court incorrectly ruled that the Respondent was entitled to preliminary and injunctive relief because the TC4 constituted a nuisance per se. [CP 477-483.]

The trial court's ruling is incorrect because the Steinmann decision was explicitly premised on the Mercer Island Code and its provision that specifically stated that property used contrary to the code was a nuisance. Steinmann, 9 Wn. App. at 485. Unlike Steinmann, the Woodinville Municipal Code does not create a nuisance per se when there is a code violation. In fact, the Woodinville Municipal Code does not even contain such a provision. Therefore, the trial court erred when it found that TC4 constituted a nuisance per se. Appellant SHARE/WHEEL respectfully requests that the Court reverse the trial Court's ruling that TC4 constituted a nuisance per se.

V. CONCLUSION

Based on the foregoing, appellant SHARE/WHEEL respectfully requests that the Court vacate the King County Superior Court's June 12, 2006 Final Order and remand the matter to the trial court.

DATED this 22nd day of September, 2006.

TODD & WAKEFIELD

By _____

Sean A. Russel WSBA #34915
Attorneys for Appellant
SHARE/WHEEL